STATE OF MICHIGAN

IN THE SUPREME COURT

In Re ESTATE OF CLIFFMAN

ELMER CARTER, PHILIP CARTER, DAVIDCARTER & DOUG CARTER,

Appellants

vs

BETTY WOODWYK & VIRGINIA WILSON

Appellees.

Supreme Court No. 151998

Court of Appeals No. 321174

Allegan County Probate Court
File No. 13-38358-DE

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APPELLEES' BRIEF IN OPPOSITION TO APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER BEING APPEALED

Four children of the Decedent's former spouse were properly determined to be ineligible from taking a portion of the wrongful death recovery because their mother predeceased the Decedent 12 years prior to the Decedent's death.

Probate Court's Order. On March 21, 2014, the Allegan County Probate Court issued an Order excluding the Appellants from receiving a portion of the wrongful death proceeds that were obtained through the settlement of the wrongful death case that arose out of the death of Gordon Cliffman, who died while unmarried and without issue. The Probate Court correctly applied the holding in ***In re Combs***, 257 Mich App 622; 669 NW2d 313 (2003); lv den 469 Mich 1021; 678 NW2d 440 (2004). A copy of that Order is attached as **Exhibit A**.

Court of Appeals Opinion – Affirms Allegan County Probate Court Order and Affirms ***Combs***. The Appellants appealed the Probate Court's March 21, 2014 Order, arguing that the Court of Appeals should ignore the rules of statutory construction by declaring the term "Spouse" ambiguous and then construing MCL 600.2922(3)(b) by resorting to legislative history and an examination of other statutes. The Court of Appeals rejected the Appellants' arguments, including their assertion that "spouse" is ambiguous, and affirmed the Allegan County Probate Court's Order and unanimously affirmed the ***Combs*** holding.

The Appellants seek leave to appeal because they think that, based on their status as adult children of the predeceased wife of Gordon Cliffman, that they should be able to take a share of the wrongful death settlement proceeds. In arguing this point to the Court, they persist in their position that at the time of Gordon Cliffman's death, their mother was his spouse.

STATEMENT OF QUESTION PRESENTED

MCL 600.2922 defines those who are entitled to damages in a wrongful death action. MCL 600.2922(3)(b) provides that "the children of the deceased's spouse" are entitled to claim damages. In the instant case, the Decedent's wife predeceased him by nearly 16 years.

QUESTIONS PRESENTED

Issue No. 1

If the woman to whom the Decedent was married predeceased him, are the adult children of that former wife, who are not the children of the Decedent, entitled to claim damages under Michigan's Wrongful Death Act, MCL 600.2922?

The Probate Court Answered: "NO"

The Court of Appeals Answered: "NO"

The Appellees Answer: "NO"

The Appellants Answer: "YES"

Issue No. 2

Did the Court of Appeals commit error when it determined that the term "spouse" as used in MCL 600.2922(3)(b) was not ambiguous and should be applied according to its plain meaning without resorting to extrinsic sources and methods of statutory construction to ascertain the legislative intent?

The Probate Court Answered: "NO"

The Court of Appeals Answered: "NO"

The Appellees Answer: "NO"

The Appellants Answer: "YES"

STANDARD OF REVIEW

When application of a statute is being considered and the meaning of the statutory language is at issue, those questions are reviewed de novo. ***In re Complaint of Rovas Against SBC Michigan***, 482 Mich 90; 754 NW2d 259 (2008).

INTRODUCTION

Gordon Cliffman died of injuries suffered in a September 2012 car accident. The Cliffman Estate pursued a wrongful death claim against the at-fault driver and a settlement was secured. Mr. Cliffman fathered no children during his life. He was not married when he died. The Appellants, adults all, claim an interest in the wrongful death settlement because they are the children of Betty Carter, who had been married to Mr. Cliffman until her death nearly 19 years ago in 1996. This claim was denied by the Allegan County Probate Court, and rightly so. The Michigan Court of Appeals affirmed the Probate Court's Order.

The Appellants seek leave to appeal the Court of Appeals Opinion affirming the Probate Court. The Application should be denied because the very issue before the Court has been settled for over 12 years and does not otherwise raise an issue of significance to the State's Jurisprudence. Further, the Application should be denied because it does not raise an issue that is critical to Michigan's jurisprudence, and because it is premised on an invitation to this Court to set aside the rule of statutory application that plain and unambiguous statutes must be applied as written and according to their plain language in favor of a rule that would provide that Courts can declare ambiguity where none exists and then engage in statutory construction to ascertain legislative intent.

FACTS OF THE CASE

FACTUAL HISTORY

In 1976, the Decedent, Gordon Cliffman, married Betty Carter. No children were born of this marriage. At the time of their marriage, Betty Carter had four sons from a previous

relationship. Her four sons are: Elmer Carter, Doug Carter, Phillip Carter and David Carter. They are the Appellants herein. The Appellants are all adults.

Betty Carter died in 1996. She and Mr. Cliffman had no children together. Mr. Cliffman never remarried. He fathered no children after Betty Carter's death. Mr. Cliffman is survived by his sisters: Betty Woodwyk and Virginia Wilson, the Appellees.

On September 22, 2012, the Decedent, Gordon J. Cliffman, was badly injured in an automobile accident. He died of his injuries on October 2, 2012. He died without a will. The vehicle he was operating was insured by Citizens Insurance Company. This Policy of Insurance included underinsured motorist benefits. The driver who caused the accident owned or was operating a vehicle that was insured by Progressive Insurance Company.

For some reason, the Decedents' estate was inappropriately opened in Ottawa County. The Ottawa County Probate Court, acting without jurisdiction, appointed Phillip Carter as Personal Representative of the Estate.

The Personal Representative retained Attorney Kenneth Puzycki to represent the Estate. The Personal Representative also hired Counsel to assert claims against the at-fault driver and Citizen's Insurance Company.

In December 2013 the Ottawa County Probate Court, which had at all times acted without subject matter jurisdiction, entered an Order transferring the Case to the Allegan County Probate Court.

The Decedent's Estate negotiated a settlement with the at-fault driver's insurance carrier and with Citizens Insurance. The total settlement was $300,000.00. The settlement amount was approved by the Allegan County Probate Court.

PROCEDURAL HISTORY

The Appellants, after seeing the sizable wrongful death settlement that had been secured, each asserted a claim for a share of the wrongful death proceeds. The Personal Representative, acting in his individual capacity, asserted a claim along with his brothers. The Appellees objected to these claims, and moved for an Order to prohibit the children of Betty Carter from taking a share of the settlement proceeds.

The Appellees' objection was heard by the Allegan County Probate Court on March 21, 2014. The Appellants' claim was barred by the holding in ***In Re Combs***, 257 Mich App 622; 669 NW2d 313 (2003). The Probate Court correctly followed the ***Combs*** holding, granted the Appellees' Motion, and entered an Order precluding Betty Carter's four adult children from asserting claims for a portion of the wrongful death settlement proceeds. The Appellants appealed this Order.

On June 9, 2015, the Michigan Court of Appeals, in a unanimous holding, affirmed the Probate Court's Order precluding Betty Carter's four adult children from asserting claims for a portion of the wrongful death settlement proceeds. The Court of Appeals concluded that they were bound by the holding in ***Combs***, but they also unanimously held that ***Combs*** had been correctly decided. A copy of the Court of Appeals' Opinion is attached as **Exhibit B**.

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LAW & ARGUMENT

Prior to the enactment of Michigan's Wrongful Death Act[1], no right of action arising out of a wrongful death existed at common law. It was held that actions for personal injury are personal to the injured party, and did not survive her death. Enactment of the Wrongful Death Act changed that.

The Wrongful Death Act (hereinafter the "WDA") governs actions for damages for injuries that result in death. Essentially, the WDA is a saving statute. It provides that if the conduct that causes death would have entitled the decedent to maintain a cause of action for damages had he or she lived, that cause of action survives the death of the decedent - it is saved - and can be maintained by the deceased person's estate through a duly appointed Personal Representative. See MCL 600.2922.

The legislature, having provided the statutory means to preserve a claim for wrongful death, also delineated those individuals who would be entitled to participate in any damages that are recovered in the wrongful death action.

Persons who are entitled to recover damages in wrongful death cases are set forth in the statute. MCL 600.2922(3) provides the categories of persons entitled to recover damages. Here is the text of that statutory section:

> (3) … [T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
> (b) **The children of the deceased's spouse.**

[1] MCL 600.2922

> (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased. (emphasis added).

MCL 600.2922(3)(b) is highlighted because it is the key section for purposes of the Appellant's efforts on appeal. Even though the ***Combs*** opinion held that the meaning of section 2922(3)(b) is not ambiguous, the Appellants disagree, and offer their suggestions on how the Court should resolve the ambiguity. Nothing in this statute is ambiguous, and the "solutions" to the "ambiguity" should be rejected.

A. INTERPRITATION OF MCL 600.2922 (3)(b) IS NOT AN ISSUE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRIDENCE.

The Appellants go to great lengths to persuade the Court that interpretation MCL 600.2922 (3)(b) is worthy appellate review by this honorable Court. However, the status of Section 2922(3)(b) is well settled, and is not in need of review.

First, the holding in ***In re Combs***, 257 Mich App 622; 669 NW2d 313 (2003) has been applicable Michigan law for over 12 years. In fact, this honorable Court denied an application for leave to appeal in 2004. See ***In re Combs***, 469 Mich 1021; 678 NW2d 440 (2004). The ***Combs*** holding has undoubtedly been applied by trial Courts throughout the state for well over a decade. This historical fact compels the conclusion that the issues, as framed by the Appellants, do not suggest the need for appellate review by the State's Highest Court. There is no disagreement between appellate panels. There has been no change in the law that requires this Court to disturb well over a decade of settled and applied law.

Second, and since the WDA is a creation of the legislature, the absence of any legislative action to address the holding in ***Combs***, supra, suggests that the Legislature does not consider ***Combs*** to be an unfounded holding or otherwise contrary to its intent in enacting the WDA. Indeed, the legislature's acquiescence is itself persuasive, and tends to show that the WDA is operating as the legislature intended.

Third, the facts as shown in ***Combs,*** and in the instant case, are unique. Indeed, they have arisen directly at the appellate level in only those two cases in the span of an almost 30 years.

Forth, the language of the MCL 600.2922(3)(b) has been examined by two panels of the Court of Appeals, and each panel reached the same conclusion: Michigan's Wrongful Death Act, as written, precludes the children of a predeceased spouse from receiving a portion of a wrongful death recovery.

B. THE TERM "SPOUSE" IS NOT AMBIGUOUS

The Appellants urge this Court to adopt their declaration by fiat that the term "spouse" as used in MCL 600.2922 is ambiguous, and then employ various methods of statutory interpretation to resolve that "ambiguity." However, this Court should decline the Appellants' invitation to declare the phrase "deceased's spouse" ambiguous, as contrary to Michigan law.

When construing a statute, Michigan Court have held that the language employed is the obvious starting point. "[T]he best measure of the Legislature's intent is simply the words that it has chosen to enact into law." ***Mayor of City of Lansing v Michigan Public Service Com'n***, 470 Mich 154, 164; 680 NW2d 840 (2004). See also ***AFSCME Council 25 v State Employees Retirement System***, 294 Mich App 1, 8; 818 NW2d 337 (2011). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further juridical

construction is permitted." ***Whitman v City of Burton***, 493 Mich 303, 311; 831 NW2d 223 (2013). If the statute's language is clear and unambiguous, "then we assume that the legislature intended its plain meaning and the statute is enforced as written." ***Roberts v Mecosta County General Hosp***., 466 Mich 57, 63; 642 NW2d 663 (2002). See also ***People v Gardner***, 482 Mich 41; 753 NW2d 78 (2008). The Court "must give every word its plain and ordinary meaning, unless otherwise defined, and may rely on dictionary definitions. If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted." ***Johnson v Pastoriza***, 491 Mich 417, 436; 818 NW2d 279 (2012). See also ***Griffith ex rel Griffith v State Farm Mut Auto Ins Co***, 472 Mich 521, 526; 697 NW2d 895 (2005)

Unless a statute is ambiguous on its face, the words of a statute must be given their ordinary meaning. Indeed, if a statute is clear and unambiguous, "then judicial construction or interpretation is unwarranted." ***Lake Carriers Ass'n v Director of Dept. of Natural Resources***, 407 Mich 424; 286 NW2d 416 (1979). See also ***Roek v Board of Educ. Of Chippewa Valley School Dist***., 122 Mich App 76; 329 NW2d 539 (1982). Perhaps recognizing that an unambiguous section of the Wrongful Death Act dooms their Appeal even before it gets started, the Appellants would have this Court make a hasty declaration of "ambiguity" in the statutory language. However, statutory language is only ambiguous "if it 'irreconcilably conflict[s]' with another provision, or when it is *equally* susceptible to more than a single meaning." ***Mayor of City of Lansing v Michigan Public Service Com'n***, 470 Mich 154, 166; 680 NW2d 840 (2004) (italics original). A too liberal rule for determining statutory ambiguity "would create a judicial regime in which courts would be quick to declare ambiguity and quick therefore to resolve cases and controversies on the basis of something other than the words of the law." ***Id*** at 166. This is exactly what the Appellants would have the Court do in the instant case.

In the instant case, MCL 600.2922(3)(a) provides that "the children of the deceased's spouse" are entitled to damages under the Wrongful Death Act. And, it is from this provision that the Appellants attempt to derive their right to assert a claim for a portion of the wrongful death settlement proceeds. But, plainly, and as the Appellants will admit, the Decedent did not have a spouse at the time of his death. His marriage to Betty Carter ended in 1996 when she died. "Marriage is a status that legally terminates only upon the death of a spouse or upon entry of a judgment of divorce." ***Byington v Byington***, 224 Mich App 103, 109; 668 NW2d 141 (1997). See also ***In re Certified Question from the United States District Court for the Western District of Michigan***, 493 Mich 70, 78-79; 825 NW2d 566 (2012).

As the Court interprets the meaning of the term "spouse," it must assume that the Legislature intended its plain meaning, and may rely for that plain meeting on the dictionary definition. ***Johnson***, supra. "Spouse" is defined as "someone who is married: a husband or wife." *Merriam-Webster Dictionary*. In ***Cornwell v Dempsey***, 111 Mich App 68; 315 NW2d 150 (1981), the Plaintiff challenged the Director of the Michigan Department of Social Services' interpretation of section 407 of subchapter IV of the Federal Social Security Act.[2] The Court concluded that:

> [T]he Department of Social Services correctly interpreted the applicable provision of the Federal Social Security Act as not providing for aid to the noncaretaker unmarried parent of a dependent child. **The act unambiguously provides for aid only to a spouse, which is defined by Webster's New Collegiate Dictionary (1976) to mean a married person.** Unless a statute is ambiguous on its face, the words must be given their ordinary meaning. ***Id*** at 70. (citations omitted) (emphasis added).

[2] 42 U.S.C. 607

The plain meaning of the term "spouse" has been correctly defined practically and by Michigan's Appellate Courts as "someone who ***is*** married." Marriages terminate upon the death of either the husband or wife. When that occurs, the survivor no longer has a spouse.

In ***Galeski v Wajda***, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2005 (Docket No. 260878) (**Exhibit C**)[3], William and Barbara Hall died simultaneously in an automobile accident. The Personal Representative of Barbara Hall's estate filed a wrongful death action against the at-fault driver. The case settled and approval of the settlement was sought. Judy Stempien, William Hall's daughter from a previous relationship, intervened and claimed a share of the settlement proceeds under MCL 600.2922(3)(b). The trial court ruled that Stempien did not qualify for benefits under the statute. Stempien appealed. The Court of Appeals reversed, holding that because they did simultaneously, William and Barbara were married at the instant of their deaths. This fact meant that Stempien was an allowed claimant under the Wrongful Death Act. The Court reasoned that:

> ***Here, the legislature merely conditioned recovery on Stempien's father not predeceasing his wife*** and Stempien herself surviving the deceased and establishing damages. Because there is no question that William did not predecease Barbara (they died simultaneously) and that Stempien survived the deceased, summary judgment was inappropriate. ***Id.*** (emphasis added).

In the instant case, the Deceased was married to Betty Carter from 1979 to her death in 1996. During that time, the Decedent had a spouse because he was married to Betty Carter. When she died, the Decedent no longer had a spouse as the term "spouse" is ordinarily defined, and as appellate courts have universally held. The marriage terminated upon Betty Carter's death. Indeed, in the family law context, the "a court is without jurisdiction to render a judgment

[3] Unpublished decisions are certainly not binding authority, most especially on this Court. The ***Galeski*** holding is offered as persuasive authority that is directly on point.

of divorce after the death of one of the parties. 'There must be living parties, or there can be no relationship to be divorced.' " ***Tokar v Albery***, 258 Mich App 350, 355; 671 NW2d 139 (2003).

The ***Combs*** majority correctly applied the plain meaning of the term "spouse" and concluded that when Arlie Combs predeceased his wife, their marriage ended on the date of his death. The holding in ***Combs*** was correctly decided, and has been bolstered by the holding in ***Galeski***, supra. Application of the ***Combs*** and ***Galeski*** holdings, and the rational of those holdings to the facts in the instant case, results in the Appellants being unable to make a claim against the wrongful death proceeds. The Allegan County Probate Court's Order, and the Court of Appeals Opinion in the instant case should be affirmed.

The way that the Appellants framed the issue runs counter to the holding in ***Mayor of City of Lansing, supra*** because it invites this Court to peremptorily declare that the term "spouse" is ambiguous, adopt the Appellants naked assertion that the phrase "children of the deceased's spouse" really means "stepchildren," and deciding the case on that basis. The Court should construe the words that the legislature actually used and the plain meaning of those words, and reject the Appellants' suggestion that the Court resolve this case by "construing" terms or phrases that the Legislature did not employ.

C. LACK OF AMBIGUITY PRECLUDES EMPLOYMENT OF RULES OF STATUTORY CONSTRUCTION

The Appellants fail in the first instance because the terms "spouse" is not an ambiguous term. It has a well-settled and commonly accepted definition both in ordinary usage and in Michigan law. Indeed, that it is often modified by prefixes or adjectives bolsters the clear meaning of the term.

The Appellants boldly assert that the term "spouse" as found in the WDA is ambiguous in order to direct the Court's decision to the various rules of statutory interpretation that have developed for resolving ambiguous statutes or parts of statutes.

In pari materia is a tool of statutory interpretation that has developed so as to resolve ambiguities in a statute by construing the statute in light of other statutes that relate in a material way to the statute one is construing. It is important to note, however, that "the interpretive aid of the doctrine of in pari materia can only be utilized in a situation where the section of the statute under examination is itself ambiguous." ***Tyler v. Livonia Pub. Sch.***, 459 Mich. 382, 392, 590 N.W.2d 560 (1999)(citations omitted). In the instant case, the Appellate Panel below examined the terms "spouse" and concluded correctly that it was not ambiguous.

Likewise, an examination of statutory history is a means and method of statutory interpretation and construction that the Appellants place great emphasis on to the point that they include transcripts of committee hearings. But, the Appellants persist in asserting that "spouse" is ambiguous. That error dooms their argument that legislative history should inform statutory construction to ascertain the legislative intent. The terms "Spouse" in MCL 600.2922(3)(b) is not ambiguous. When statutory language is clear, "there is no ambiguity that would permit or justify looking outside the plain words of the statute." ***In re Certified Question from U.S. Court of Appeals for the Sixth Circuit***, 468 Mich 109, 659 NW2d 597 (2003).

The Appellants invite the Court to be distracted by a tortured examination of language in the Estates and Protected Individuals Code ("EPIC"), 700.1011, et sec., together with certain portions of legislative history so as to pass over the fundamental weakness in their position: that the WDA is not ambiguous in the first place.

D. CHILDREN OF THE DECEDENT'S SPOUSE COULD INCLUDE CHILDREN OF FORMER SPOUSES WHOM THE DECEDANT DIVORCED.

Finally, the Appellants urge the Court to conclude that "children of the deceased's spouse" include children of a predeceased former spouse. But, the rationale that the Appellants urge to the Court could equally be applied to children of a former spouse from whom the Decedent was divorced. The rule that the Appellants offer to the Court carries with it the potential to open up the settlement of wrongful death cases to children of a former spouse (or former spouses) from who the decedent had been divorced for years or decades. And, while the Appellants are quite correct that the statute provides the denominated class of claimants an opportunity to participate in the distribution of settlement proceeds, what that translates into could be scores of claimants coming out of the woodwork, attracted by the prospect of a financial windfall. Each claimant would have the right to a hearing, which carries with it the right to appeal. That is the Pandora's Box that the Appellants would have this Court open.

CONCLUSION

Michigan jurisprudence has developed so as to require Courts to apply statutes as written as long as the language employed by the legislature is not ambiguous or otherwise susceptible to more than one reasonable interpretation. If a statute is clear, if the language and terms of a statute do not permit multiple interpretations, then Courts (and litigants for that matter) must not go beyond the language of the statute and must apply it as written.

In the instant case, the term "spouse" has a meaning that is well understood in ordinary usage, and has been examined and defined by Michigan Courts. The term is simply not

ambiguous, and has never been found to be ambiguous. This fact is fatal to the Appellants appeal.

The Appellants' legal position, framed as it is in their Application, is without merit, and the issue that the Appellants would have this Court take up is not of major significance to the State's jurisprudence. The Appellees request that the Appellants Application for Leave to Appeal be denied.

Respectfully submitted,

CUNNINGHAM DALMAN, P.C.
Attorneys for Appellees

Date: August 7, 2015

/s/ Kenneth B. Breese
Kenneth B. Breese (P27177)
Kenneth M. Horjus (P52766)

Exhibit A

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF ALLEGAN
* * * * * *

In the matter of GORDON CLIFFMAN, ***deceased***

FILE NO. 13-58358-DE
HONORABLE MICHAEL L. BUCK

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ORDER

At a session of the Allegan County Probate Court
held in Allegan, Allegan County, Michigan **on March 21, 2014**

PRESENT: THE HONORABLE MICHAEL L. BUCK (P27674)

This Court, finding that proper notice having been given to all interested persons, and the Court having been fully advised in these premises, states as follows;

IT IS HEREBY ORDERED that Petitioners' Motion for Declaratory Relief is GRANTED and that the respondents, Elmer Carter, Phillip Carter, David Carter and Doug Carter, are hereby precluded from filing a claim for any portion of the wrongful death settlement proceeds under MCL 600.2922(3)(C).

IT IS SO ORDERED.

3-21-14
Date

Probate Court Judge Michael L. Buck (P27674)

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CLIFFMAN.

PHILLIP CARTER, ELMER CARTER, DAVID CARTER, and DOUG CARTER,

Appellants/Cross-Appellees,

v

RICHARD D. PERSINGER, Personal Representative of the Estate of GORDON JOHN CLIFFMAN,

Appellee,

and

BETTY WOODWYK and VIRGINIA WILSON,

Appellees/Cross-Appellants.

UNPUBLISHED
June 9, 2015

No. 321174
Allegan Probate Court
LC No. 13-058358-DE

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Appellants/cross-appellees Phillip, Elmer, David and Doug Carter appeal as of right the probate court's order granting appellees/cross-appellants Betty Woodwyk and Virgina Wilson's petition for declaratory relief, which precluded appellants from sharing in a wrongful-death settlement. Appellees/cross-appellants cross-appeal the order denying Woodwyk's motion to set aside an earlier order approving the settlement as well as attorney fees paid from the settlement. Because appellants are not entitled to a share in the proceeds of the wrongful-death settlement and the trial court did not err by approving a disputed attorney referral fee, we affirm.

On October 2, 2012, John Gordon Cliffman died from injuries he suffered in an automobile accident. It is undisputed that Cliffman had no children, he died intestate, and his wife Betty Carter died in 1996. Appellants are Betty Carter's sons, and appellees Woodwyk and Wilson are Cliffman's sisters.

The probate court appointed Phillip Carter as personal representative of the Estate. Phillip hired attorney Jeffrey Buckman to represent the Estate in a wrongful-death action and agreed that Buckman would receive a contingency fee of one-third of what he obtained on behalf of the Estate. Phillip also hired attorney Kenneth Puzycki at an hourly rate to perform the necessary services to process the Estate through probate.

On December 18, 2013, the probate court approved a settlement between the Estate, Progressive Insurance Company, and Citizens Insurance Company. This settlement resulted in $300,000 for the estate minus a one-third contingency fee paid to Buckman. From his contingency fee, Buckman also paid Puzycki a referral fee. Woodwyk then moved the probate court to set aside its December 18, 2013 order approving the settlement, alleging that, among other matters, the referral fee paid by Buckman to Puzycki was improper because the Estate was already paying Puzycki an hourly rate. The probate court denied the motion, stating that the referral fee to Puzycki did not harm the Estate; rather, fee sharing was standard practice and burdened only Buckman because the Estate would be paying the same percentage regardless.

Thereafter, Woodwyk and Wilson petitioned the probate court to declare that appellants could not claim a share of the proceeds from the wrongful-death settlement, arguing that, pursuant to *In re Combs Estate*, 257 Mich App 622; 669 NW2d 313 (2003), appellants could not recover damages under MCL 600.2922(3)(b) because their mother, Betty Carter, predeceased Cliffman. The probate court granted Woodwyk and Wilson's petition. Appellants now appeal as of right seeking a share in the wrongful-death settlement, and appellees have filed a cross appeal challenging the propriety of the referral fee Buckman paid to Puzycki.

On appeal, appellant's claim that they are entitled to share in the wrongful-death settlement proceeds because, under MCL 600.2922(3)(b), when there has been a settlement of a wrongful death claim, "[t]he children of the deceased's spouse" may be entitled to a share in the recovery if they suffered damages and survived the deceased. This argument is plainly without merit, however, because the issue of whether a decedent's stepchildren may share in a recovery from a wrongful-death settlement, when their parent who was married to the decedent has predeceased the decedent, was unequivocally settled by this Court in *In re Combs Estate*, 257 Mich App at 625. There, this Court considered the plain language of MCL 600.2922(3)(b) and succinctly explained that the term "spouse" refers to "a married person." *Id.*, citing *Cornwell v Dempsey*, 111 Mich App 68, 70; 315 NW2d 150 (1981). As a matter of law, it is well-settled in Michigan that the death of a spouse terminates a marriage. See *In re Certified Question from US Dist Court for W Mich*, 493 Mich 70, 79; 825 NW2d 566 (2012); *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). Given that death terminates a marriage, upon one party's death, the individuals are no longer married and the surviving individual no longer has a "spouse" within the meaning of MCL 600.2922(3)(b). *In re Combs Estate*, 257 Mich App at 625. As a result, stepchildren are not entitled to damages under MCL 600.2922(3)(b) when their parent, who was married to the decedent, has predeceased the decedent because these children are not "children of the deceased's *spouse*." *In re Combs Estate*, 257 Mich App at 625.

It follows that, in this case, appellants are not entitled to a share in the wrongful-death settlement proceeds because their mother predeceased Cliffman in 1996, meaning that, at the time of his death in 2012, Cliffman had no "spouse" and thus there are no spouse's children

entitled to recovery under MCL 600.2922(3)(b). See *In re Combs Estate*, 257 Mich App at 625. Indeed, appellants do not contest that this Court's holding in *In re Combs Estate* precludes their recovery under MCL 600.2922(3)(b). Instead, appellants argue that *In re Combs Estate* was wrongly decided. *In re Combs Estate* is, however, binding precedent of this Court. See MCR 7.215(J)(1). Moreover, we do not disagree with *In re Combs Estate*, and we decline appellants' request to express such disagreement or to convene a special panel on this issue. See MCR 7.215(J)(2), (3). In short, under binding appellate precedent, appellants are not entitled to recovery under MCL 600.2922(3)(b), and thus the trial court did not err by concluding that they could not share in the wrongful-death settlement proceeds at issue in this case.

Next, in their cross-appeal, Woodwyk and Wilson argue that the probate court erred by determining that the referral fee paid by Buckman to Puzycki was valid. Contrary to this assertion, MRPC 1.5(e) permits attorneys who do not work in the same firm to divide a fee between each other. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 45; 672 NW2d 884 (2003). Specifically, "[a] division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable." MRPC 1.5(e). Here, at all relevant times, the client was Philip acting as personal representative of the Estate. Appellees offer no evidence to indicate that Philip was unaware of the referral fee or that he objected to this fee or Puzycki's participation. Indeed, at this time it is Woodwyk and Wilson, not Philip, objecting to this fee. Moreover, Woodwyk and Wilson also do not argue that the one-third contingency fee to Buckman is unreasonable. And, indeed, "the receipt, retention, or sharing" of a one-third contingency fee in a wrongful-death case is "deemed fair and reasonable" according to MCR 8.121(A) and (B). Thus, it appears that MRPC 1.5(e) permits Buckman to pay Puzycki a referral fee from his contingency fee.

Woodwyk and Wilson complain on appeal that Puzycki's referral agreement with Buckman was not specifically set forth in writing. However, Buckman's contingent fee agreement with the Estate was set forth in writing as required by MCR 8.121(F) and MCR 5.313(B), and appellees point to no authority requiring that the referral-fee agreement between Puzycki and Buckman also be in writing. Indeed, it is not disputed that the referral fee to Puzycki was paid from Buckman's contingency fee rather than from the Estate. Therefore, even if the referral-fee agreement were invalid, it is unclear why Woodwyk and Wilson contend that this referral fee should revert to the Estate rather than to Buckman given that Buckman had a written agreement to receive one-third of the settlement and Puzycki was paid from Buckman's existing fee. Woodwyk and Wilson make no argument to support this contention and have thus abandoned it. *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 366-367; 824 NW2d 609 (2012). In sum, because there is no indication that Philip was unaware of, or objected to, Puzycki's referral fee, and because the total fee agreement was reasonable, the probate court properly held that the referral fee was valid. MRPC 1.5(e).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

Exhibit C

Court of Appeals, State of Michigan

ORDER

Daniel E Galeski v Mark Wajda

Docket No. 260878

LC No. 03-341464

Brian K. Zahra
Presiding Judge

Mark J. Cavanagh

Donald S. Owens
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued August23, 2005, is hereby VACATED. A new opinion is attached to this order.

COURT OF APPEALS OF THE STATE OF MICHIGAN
TUEBOR
CIRCUMSPICE
1965

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 01 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DANIEL E. GALESKI, Personal Representative of the Estate of Barbara L. Hall, Deceased,

Plaintiff-Appellee,

v

MARK WAJDA and HELEN WAJDA,

Defendants,

and

JUDY STEMPIEN

Intervening Plaintiff-Appellant.

UNPUBLISHED
December 1, 2005

No. 260878
Wayne Circuit Court
LC No. 03-341464-NI

ON RECONSIDERATION

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Intervener Stempien appeals by leave granted from an order summarily dismissing her claim for a share of the proceeds from a wrongful death action. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

William and Barbara Hall died simultaneously in an automobile accident. Plaintiff filed this wrongful death action on behalf of Barbara Hall's estate. Plaintiff and defendants settled the case and sought court approval of the settlement. Stempien, William's daughter and Barbara's stepdaughter, intervened, claiming a right to a share of the proceeds under MCL 600.2922(3)(b). The trial court ruled that Stempien did not qualify for benefits under the statute and granted plaintiff's motion for summary disposition. This appeal followed.

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Statutory interpretation is a question of law that we also review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The persons who may be entitled to damages in a wrongful death action are identified by MCL 600.2922(3), which provides in part:

> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
>
> (b) The children of the deceased's spouse.

The trial court declared that Stempien was not a person entitled to damages under MCL 600.2922(3)(b), on the ground that she was not a child of Barbara's spouse because William was presumed to have predeceased Barbara under MCL 700.2104, § 2104 of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. By its own terms, MCL 700.2104 creates a presumption that a person who would otherwise have been an heir predeceased a decedent if the person did not survive the decedent by 120 hours; it applies only to homestead allowance, exempt property, and intestate succession. However, intestate succession only affects those entitled to damages under the last category in MCL 600.2922(3)(a).

> (3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
>
> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then *those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.* [Emphasis added.]

Generally, in issues of statutory interpretation, a modifying clause applies only to the last antecedent. *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004). Therefore, the laws of intestate succession govern those who may recover damages under MCL 600.2922(3)(a), other than the deceased's spouse, children, descendants, parents, grandparents, brothers or sisters who survive the deceased. Thus, MCL 700.2104 clearly does not apply to William, the deceased's spouse. Since it does not apply, there is no presumption that William predeceased Barbara.

Regardless, Stempien's claim is premised on MCL 600.2922(3)(b), which provides in relevant part "the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased . . . . (b) The children of the deceased's spouse." MCL 600.2922(3)(b) contains no reference to intestate succession and, indeed, cannot refer to intestate succession because the laws of intestate succession, MCL 700.2101 to MCL 700.2114, do not provide a stepchild the right to inherit a portion of a stepparent's intestate estate, and MCL 700.1103 provides that a person entitled to take as a child does not include an individual who is only a stepchild. Because an omission of a provision in one part of a statute should be construed as intentional when the provision is included in another part of the statute, *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993), we conclude that MCL 700.2104 does not apply to Stempien's right to recover under MCL 600.2922(3)(b).

Citing *Twichel v MIC Gen Ins Corp,* 469 Mich 524, 531; 676 NW2d 616 (2004), our dissenting colleague notes, "William cannot be 'the deceased's spouse' for purposes of one

provision of the statute and not another provision of the same statute." In *Twichel, supra* at 530-532, the Supreme Court indicated that the language used by the Legislature in two separate statutes was virtually identical and, thus, required identical interpretation by the courts. Here, the dissent focuses on the term "the deceased's spouse," and concludes that William could not recover under the wrongful death statute because he did not survive his wife; hence, William was not the deceased's spouse, and Stempien was also barred from recovery. While we agree that William could not recover damages for his wife's wrongful death, we do so because he did not survive his wife, not because he was presumed to have predeceased her. William was the deceased's spouse at the time of her death, and certainly at the time the wrongful death action accrued.

> "[U]nder the wrongful death act a cause of action accrues at the time of infliction of the fatal injury, rather than the time of death (*Hawkins* [*v Regional Med Labs,* 415 Mich 420, 437; 329 NW2d 729 (1982)]) . . . even where the death is immediate, the act and injury causing death still must logically precede the death itself and thus the action accrues prior to and survives death." [*Hardy v Maxheimer,* 429 Mich 422, 440; 416 NW2d 299 (1987).]

Therefore, a wrongful death action accrues at the time of the infliction of the fatal injury, which precedes death. And a marriage does not legally terminate until the death of a spouse. *In re Combs Estate,* 257 Mich App 622, 625 n 6, 669 NW2d 313 (2003), citing *Byington v Byington,* 224 Mich App 103, 109; 568 NW2d 141 (1997). Since they died simultaneously, they were married at the instant of their deaths. Furthermore, nothing in MCL 700.2104 affects the marital status of the parties at the time of death; the provision merely provides a consistent means of determining survivorship for the purpose of efficient distribution of a decedent's estate. See MCL 700.1201. Thus, while William did not survive Barbara for the purpose of intestate succession, he was still her spouse for the purpose of a wrongful death action at the time the action accrued and up to and including the instant of her death.

There is nothing in the plain language of the statute itself that makes Stempien's entitlement to recovery contingent on William's right to inherit by intestate succession. Had the Legislature intended the result urged by the dissent in this case, it could easily have done so. This Court should not incorporate in a statute a provision that the Legislature did not expressly include. *Polkton Twp v Pellegrom,* 265 Mich App 88, 103; 693 NW2d 170 (2005). Here, the Legislature merely conditioned recovery on Stempien's father not predeceasing his wife and Stempien herself surviving the deceased and establishing damages. MCL 600.2922(3). Because there is no question that William did not predecease Barbara (they died simultaneously) and that Stempien survived the deceased, summary disposition was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Donald S. Owens